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In The

Supreme Court of the United States

October Term, 1995

BROWN GROUP, INC. d/b/a BROWN SHOE COMPANY,

Petitioner,

vs.

SHERRY AARON, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES N. FOSTER, JR.
Counsel of Record
MICHELLE M. CAIN
McMAHON, BERGER, HANNA,
LINIHAN, CODY & McCARTHY
Attorneys for Petitioner
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131
(314) 567-7350

9469
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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QUESTION PRESENTED

Whether civil actions brought under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-09, should be characterized as common law breach of contract actions for purposes of borrowing the most closely analogous state statute of limitations in Missouri.

PARTIES TO PROCEEDINGS BELOW AND RULE 29.1 STATEMENT

Petitioner/Defendant Below

Brown Group, Inc. is a publicly traded corporation that has no parents and no subsidiaries that are not wholly-owned.

Respondents/Plaintiffs Below

Respondents are Sherry Aaron, Deborah D. Barber, Dolores V. Beauchamp, Patricia Beauchamp, Brenda Becker, Eva M. Becker, Alice M. Cox, Billi Jo Crews, Betty Doyle, Patty Dull, Jessie F. Dunlap, Lois I. Elseman, Augusta Emmons, Cathy M. Ethington, Carol J. Foster, Joseph E. Foster, Virginia M. Foster, Donald Fritchey, Melissa C. Galbraith, Cristel Goodman, Lola F. Harlan, Lucinda R. How, Frances Huffman, Shirley Humphrey, Sharon L. Hurst, Brenda Kissinger, Edith Krull, Daisy L. Maddox, Gladys McNew, Rita Messersmith, Anna M. Miller, Kathryn Warnol Mitchell, Dorothy Newkirk, Beverly J. Norton, Eugenia S. Plotner, Becky Jo Ray, Erika K. Rea, Helen J. Rea, Brenda K. Reedy, Debbie Rhew, Phyllis Rice, Clifford E. Robertson, Kimberly Rollins, Mary Rollins, Troy Rollins, Virginia Rollins, Jane A. Ruhl, Nina L. Scrabeck, Mary K. Sherrell, Jerry R. Stricklan, Brenda S. Stricklan, Patricia Strickland, Phyllis J. Teel, Linda J. Tucker, Darlene Vineyard, Lula D. Wesser, Patricia Wiles, Allie Willis, JoAnn Wilson, Thelma Withers, Cynthia Wyss, Marshall Wyss, Marion M. York, on behalf of themselves and similarly situated aggrieved employees; Laverne Akery, Tina S. Alexander, E. W. Anderson, Leona Asberry, Ida Fae Baker, Michael Beasley, Dennis Beasley, S. Dianne Beasley, Tammy Beasley, Patricia Lynn Byrd, Eula Mae Cochran, Dolores Colby, Beth Davis, Charline Davis, Tim Davis, Belinda Decker, Shirley Sue Edwards, Raymond E. Edwards, Glenda K. Emmons, Jessie Gilbert, Richard Gilbert, Millie Hardwick,

Shirley Kizer, William Lane, Martha Messersmith, Alice Mitchell, Jerry Nelson, Ruth A. Parker, Sharon K. Ray, Dianna Rollins, Caroline Sharp, Samuel Sharp, Bob E. Spurgeon, Elsie Spurgeon, Wanda J. Van Scoy, Sandra White, Ruth Wilson, Sharron K. Yoakum, Henrietta Akery, Vicky Asberry, Dianna Beal, Kimberly D. Bowman, Pamela Bryant, Tammy Crane, Petriva L. Davis, Joyce L. Foreit, Emmitt D. Gilbert, George P. Gilbert, Peggy S. Gilbert, Tracy N. Hance, Kimberly L. Harsch, Carrie Jones, Viola Jones, Virgie Lane, Sandra Lawson, Yuvonda Fay Mayo, Lori Prater, Vera Prater, Alonzo F. Provancha, Diana D. Rollins (Tilley), Norma Russell, Dorothy Sharp, Jerri Rae Sherrell, Margie L. Steen, Charolett Thompson, Patricia P. Tilley, Sandra S. Tilley (Parker), Dawn L. Wagoner, Linda M. Wagoner, Jean Wray, Margaret V. Yoakum, Martha J. Baker, Edna Cousart, Carolyn J. Evans, Linda A. Glick, Douglas E. McClendon, Patricia McClendon, and Carolyn S. Prock.

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Brown Group, Inc. d/b/a Brown Shoe Company ("Brown Shoe") respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Aaron et al. v. Brown Group, Inc.*, 80 F.3d 1220 (8th Cir. 1996).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 80 F.3d 1220 and is reprinted in the appendix to this certiorari petition ("Pet. App.") at pp. 2a-12a. The order of the court of appeals denying Brown Shoe's Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted at Pet. App. 1a. The opinion of the United States District Court for the Eastern District of Missouri denying Brown Shoe's Motion to Dismiss is unreported and is reprinted at Pet. App. 13a-23a.

STATEMENT OF JURISDICTION

The Eighth Circuit Court of Appeals issued its decision and judgment herein on April 4, 1996. A timely Petition for Rehearing was denied on May 30, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. § 2101-2109, is set forth in Appendix D at Pet. App. 24a-35a. The relevant provisions of the Missouri Wages and Hours Act, Mo. Rev. Stat. §§ 290.100-110, are set forth in Appendix E at Pet. App. 36a-37a. The relevant Missouri statutes of limitations at issue are set forth in Appendix F at Pet. App. 38a-39a.

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiffs/Respondents Sherry Aaron *et al.* are former employees of Defendant/Petitioner Brown Shoe's Dixon, Missouri plant who commenced this action in the United States District Court for the Eastern District of Missouri, alleging that Brown Shoe had violated the WARN Act.[1] In their Complaint, Respondents claimed that Brown Shoe's January 17,1992 notice to its workers that it intended to close the Dixon plant and permanently lay off all employees on March 20, 1992 failed to comply with the technical requirements of the WARN Act. Respondents asserted that Brown Shoe's written notice to William R. Treece of the United Food and Commercial Workers International Union was not in compliance with the WARN Act because Treece was not the exclusive representative of the affected employees.[2] Respondents also contended that Brown Shoe began terminating its employees on January 20, 1992 and continued to terminate workers throughout February and March of 1992, in violation of the statute. As relief, Respondents sought back pay and fringe benefits for sixty days or for each

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1. Respondents have amended their initial complaint three times to add additional plaintiffs, without objection from Brown Shoe. In their initial complaint, sixty-three plaintiff were listed. The three amendments to the complaint have added an additional seventy-nine plaintiffs but have not otherwise changed the complaint in any way. In the interests of brevity, the complaint and its amendments will hereinafter be referred to as "the Complaint" and the Plaintiffs/Respondents will hereinafter be referred to as "Respondents."

2. All Respondents in this case were represented for collective bargaining purposes by the United Food and Commercial Workers Union and its Local 751. Treece was the official who had signed the collective bargaining agreement with Brown Shoe on behalf of the international union.

day of each employee's employment loss, plus attorney's fees and costs. Respondents' Complaint was filed on January 31, 1994, over two years after Brown Shoe's alleged violation of the WARN Act.[3]

On February 18, 1994, Brown Shoe filed a motion to dismiss the Complaint on the grounds that the action was barred by the six-month statute of limitations applied to actions brought pursuant to Section 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b), or, in the alternative, by the one-year state statute of limitations applicable to claims brought pursuant to the Missouri Wages, Hours and Dismissal Rights statute [hereinafter "Wages and Hours Act"], Mo. Rev. Stat. §§ 290.100-110. The district court denied Brown Shoe's motion to dismiss on November 23, 1994, applying instead the five-year state statute of limitations for the common law cause of action for breach of contract. (Pet. App. 22a).

On interlocutory appeal, the Eighth Circuit affirmed the district court's ruling, holding that the five-year Missouri statute of limitations for breaches of contract was the most

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3. Respondents' Complaint in this case was filed after a WARN Act lawsuit filed by their union, Local 751, on behalf of its members (including these Respondents) for the same alleged violation of the WARN Act by Brown Shoe was dismissed by the United States District Court for the Eastern District of Missouri for lack of standing. *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc. d/b/a Brown Shoe Company*, 820 F. Supp. 1192 (E.D. Mo. 1993). On appeal, the Eighth Circuit affirmed the district court's ruling in the *UFCW* case. 50 F.3d 1426 (8th Cir. 1995). Last term, however, this Court granted the Union's petition for writ of certiorari and reversed the Eighth Circuit's decision, holding that the Union had standing to assert the monetary damage claims of its members. __ U.S. __, 116 S. Ct. 1529 (1996). Both this case and the *UFCW* case are currently pending before the United States District Court for the Eastern District of Missouri, which has consolidated the two cases on remand.

closely analogous cause of action to WARN Act claims. (Pet. App. 10a-11a). The Court of Appeals reached this conclusion by discounting the similarities in purposes and provisions between the WARN Act and the Missouri Wages and Hours Act, which contains a provision requiring employers to provide thirty days notice of reduction of wages and another provision permitting employees to collect up to sixty days of backpay when their employers fail to pay them promptly for wages due upon termination. Mo. Rev. Stat. §§ 290.100, 290.110. Ignoring the remarkably similar provisions and purposes in the Missouri Wages and Hours Act, the Eighth Circuit instead analogized the Respondents' claim to a common cause of action for breach of contract by inferring an employment contract between the employer and the employees in the provisions of the WARN Act, in spite of the fact that Missouri is an employment at-will state. (Pet. App. 11a). While acknowledging that the provisions of the Wages and Hours Act "resemble some of WARN's requirements," and that the statutes contained "similarities," the court of appeals concluded that the Wages and Hours Act's provisions were too "narrow" to be compatible with the WARN Act. (Pet. App. 8a-9a). Instead, the Eighth Circuit found a common law breach of contract claim more analogous to a WARN Act claim because, according to the appellate court, "[i]n a sense, WARN inserts additional terms into covered employment contracts." (Pet. App. 11a). The Eighth Circuit also ignored the fact that in this case, the *only* possible "covered employment contract" between the Respondents and Brown Shoe was the collective bargaining agreement between Brown Shoe and Respondents' union. Its holding is entirely inconsistent with the framework this Court has established to determine the most analogous state statute of limitations for borrowing purposes.

The Eighth Circuit denied Brown Shoe's Petition for Rehearing and Suggestion for Rehearing En Banc on May 30, 1996.

B. The Statutes At Issue.

The WARN Act is designed to provide employees with sixty days warning of plant closings and mass layoffs. 29 U.S.C. § 2102(a); 20 C.F.R. § 639.1(a); 134 Cong. Rec. 15923 (1988). A covered employer must notify each employee or the employees' union, as well as the local government, in writing of its intention to close a plant or engage in a mass layoff sixty days prior to the action. 29 U.S.C. § 2102(a). This advance notice "provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs, and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market." 20 C.F.R. § 639.1(a) (1994). Any employer who violates the notice provisions may be held liable to the unnotified employees in a civil action for "back pay for each day of violation," 29 U.S.C. § 2104(a)(1)(A), "up to a maximum of 60 days," 29 U.S.C. § 2104(a)(1). The statute also provides a civil penalty of five hundred dollars a day when an employer fails to notify the local government. 29 U.S.C. § 2104(a)(3).

The Missouri Wages and Hours Act, parallels both the purposes and provisions of the WARN Act. Section 290.100 requires covered employers to provide workers with thirty days written notice of a reduction in wages and assesses a penalty against the employer for noncompliance. Section 290.110 of the Wages and Hours Act requires employers to pay discharged employees promptly upon termination and permits an aggrieved employee to collect up to sixty days wages for violations of the statute. The Wages and Hours Act also contains a provision permitting a cause of action for breach of an employment contract for employees whose employment is for a definite period of time, Mo. Rev. Stat. § 290.130, a provision requiring employees to be paid semimonthly, Mo. Rev. Stat. § 290.080, a limitation on working hours in certain industries, Mo. Rev. Stat. § 290.020, and a provision requiring employers

to provide discharged employees with service letters upon request, Mo. Rev. Stat. § 290.140. The Wages and Hours Act thus provides a comprehensive scheme designed to protect workers against the managerial decision of their employers, as does the WARN Act.

These provisions of the Wages and Hours Act were for the most part enacted at the beginning of this century as "social or labor legislation." *McLaurin v. Frisella Moving and Storage Co.*, 355 S.W. 2d 360, 363 (Mo. App. 1962); *see also Monterosso v. St. Louis Glove-Democrat Publishing Co.*, 368 S.W. 2d 481, 489 (Mo.), *cert. denied*, 375 U.S. 908 (1963). In *McLaurin*, the Missouri Court of Appeals explained the purposes and goals behind the legislation:

> [A]t that stage of our economic history a majority of those gainfully employed had become wage earners, highly dependent on their wages for their sustenance and that of their families. It was recognized that to deprive them of their wages for an unreasonable length of time would tend to make them the objects of public charity, and therefore be injurious to the community as a whole.

McLaurin, 355 S.W.2d at 363. Because §§ 290.100 and 290.110 are penal in nature, their limitations period is one year. Mo. Rev. Stat. § 516.380; *Brackett v. Eastern Boot and Shoe Co.*, 388 S.W. 2d 842 (Mo. 1965).

REASONS FOR GRANTING THE WRIT

Like many other federal statutes, the WARN Act does not provide a limitations period for the civil actions authorized by

the statute. Two terms ago, in *North Star Steel Co. v. Thomas*, __ U.S. __, 115 S. Ct. 1927 (1995), this Court resolved a split in the circuits regarding the question of whether a federal or state statute of limitations was the appropriate one to apply to WARN Act claims, holding that the federal courts must apply the state statute of limitations for actions which are "most closely analogous" to WARN Act claims. This Court did not pick the most closely analogous state statute in *North Star Steel* because under any of the statutes of limitations at issue in that case, the actions were timely. *Id.* In this case, however, the issue of which state statute of limitations is most closely analogous to the WARN Act is crucial and controlling because under the five-year statute of limitations applied by the district court and the court of appeals, Respondents' WARN Act claims are timely, while under the one-year statute of limitations Brown Shoe contends is more analogous, Plaintiffs' claims are untimely. Thus, the issue left unresolved in *North Star Steel* is squarely presented in this case.

Certiorari is appropriate in this case to determine the important question of federal labor law left unresolved in *North Star Steel*, that is, the proper characterization of WARN Act claims for purposes of state law borrowing. Without such a characterization from this Court, the lower courts will continue to engage in time consuming and expensive litigation on an issue collateral to the merits of WARN Act claims, a danger which this Court has recognized with respect to other federal statutes which borrow state law limitations periods. *Owens v. Okure*, 488 U.S. 235 (1989); *Reed v. United Transportation Union*, 488 U.S. 319, 325 (1989); *Wilson v. Garcia*, 471 U.S. 261 (1985). In *Reed*, this Court noted that such "collateral litigation" "creates uncertainty to the time available for filing" and may in fact have a deterrent effect on would-be plaintiffs because of the "prospect of prolonged litigation." 488 U.S. at 326. Such a result is equally likely in WARN Act litigation.

This Court should also grant review because the Eighth Circuit's holding departs significantly from the analytical process this Court has established to determine the most analogous state law statute of limitations for federal causes of action. The court of appeals did not engage in any meaningful analysis of the fundamental essence of the claims at issue, including WARN Act claims, breach of contract claims and claims under the Wages and Hours Act. Nor did it compare the elements of those causes of action.

The Eighth Circuit's opinion not only misapplies federal borrowing principles, it fundamentally misperceives the role of federal courts in the state's decision that its workers are employed at-will absent any written contract. The lower court's application of a breach of contract statute of limitations to WARN Act claims, and, perhaps more importantly, its decision that a federal statute can imply contract rights between workers (even those already protected by a collective bargaining agreement) and their employer, abrogates the Missouri legislature's long standing and consistent refusal to alter the at-will employment status of workers in Missouri and its decision that courts may *not* imply employment contracts for at-will employees in Missouri. Given that there is no evidence in the WARN Act or elsewhere of Congress' intent to preempt state employment law doctrine, the Eighth Circuit's inference of an employment contract in the terms of the statute is improper. The vital principles of federalism thus implicated by the Eighth Circuit's opinion merit review by this Court.

I.

THIS COURT SHOULD ESTABLISH A UNIFORM CHARACTERIZATION OF WARN ACT CLAIMS FOR STATE LAW BORROWING PURPOSES.

In *Reed*, *Wilson*, and *Owens*, this Court recognized the inherent confusion among lower courts when they are left to characterize federal causes of action for application of state law statutes of limitations. *Owens*, 488 U.S. at 240; *Reed*, 488 U.S. at 626; *Wilson*, 471 U.S. at 272. In *Owens*, for example, this Court stated that with respect to claims brought pursuant to 42 U.S.C. § 1983, "The practice of seeking state-law analogies for particular claims bred confusion and inconsistency in the lower courts and generated time consuming litigation." 488 U.S. at 240. In *Reed*, this Court held that, with respect to applying a state law statute of limitations to claims brought pursuant to §101(a)(2) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2):

> Time-consuming litigation as to the collateral question of the appropriate statute of limitations for a § 101 claim would likely interfere with Congress' aim that actions to enforce free speech and association rights should in fact enhance union democracy. Such litigation creates uncertainty to the time available for filing, and it would not be surprising if the prospect of perhaps prolonged litigation against the union before ever the merits are reached were to have a deterrent effect on would-be § 101(a)(2) plaintiffs.

488 U.S. at 326. The opinions in *Owens* and *Reed* reflected the

concern which this Court addressed in *Wilson* regarding the characterization of federal claims for state law borrowing purposes: that a case-by-case approach "breeds uncertainty and time consuming litigation that is foreign to the central purpose" of the federal statute. 471 U.S. at 272. The *Wilson* Court held that "practical considerations" justified "a simple broad characterization of all § 1983 claims" in order to "best fit[ ] the statute's remedial purpose." 471 U.S. at 272.

A "simple broad characterization" of WARN Act claims would also best fit that statute's remedial purposes. The remedial provisions of the WARN Act were designed to provide "prompt adjustment and training services to dislocated workers." S. Rep. No. 62, 100th Cong. 1st Sess. 2 (1987). The civil enforcement and venue provisions of the Act, as well as its lack of an administrative filing requirement prior to commencement of a lawsuit and its provision permitting the award of attorneys' fees, all demonstrate that Congress intended the scope of the statute to be as broad as possible to permit prompt enforcement of the WARN Act's remedial measures. The "uncertainty and time consuming" litigation spawned by the necessity of borrowing a state law statute of limitations without an overall characterization of WARN Act claims would frustrate the purposes of the WARN Act's remedial provisions to provide *prompt* adjustment and retraining to displaced workers. It could also, as this Court warned in *Reed*, discourage potential plaintiffs from filing lawsuits.

A characterization by this Court of the essence of WARN Act claims for borrowing purposes would eliminate the uncertainty, confusion and conflicting results likely to be reached in different jurisdictions by the lower courts. Although this Court in *North Star Steel* gave the lower courts' guidance with respect to borrowing state law statutes of limitations for

WARN Act claims, an important issue — how to characterize the essence of WARN Act claims — remains unresolved. Until a consistent characterization of WARN Act claims is imposed upon the lower courts, the collateral issue of the appropriate statute of limitations will continue to be litigated on a state-by-state basis, compounding the time and expense involved in what Congress clearly intended to be a relatively simple remedy. *See Wilson*, 471 U.S. at 275 ("federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach"). Establishing a uniform characterization of WARN Act claims will, as this Court noted in *Owens* with respect to § 1983 actions, provide the lower courts with a rule "that can be applied with ease and predictability in all 50 States." 488 U.S. at 242.

II.

THE EIGHTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THIS COURT'S ESTABLISHED STATE LAW BORROWING PRINCIPLES.

When Congress has failed to provide a statute of limitations for federal causes of action, this Court has held that the federal courts must "borrow the most suitable statute or other rule of timeliness from some other source." *DelCostello v. Teamsters*, 462 U.S. 151, 158-59 (1983). The analytical framework for determining the most analogous source of limitations has long been established by this Court:

> [I]n determining the appropriate statute of limitations, the initial inquiry is whether all claims arising out of the federal statute "should be characterized in the same way, or whether they should be evaluated differently

> depending upon the varying factual circumstances and legal theories presented in each individual case". . . . Once this characterization is made, the next inquiry is whether a federal or state statute of limitations should be used.

Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 146 (1987) (quoting *Wilson*, 471 U.S. at 268); *see also Lampf, Plevka, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). If a state statute of limitations is chosen, the courts "must characterize the essence of the claim . . . and decide which state statute provides the most appropriate limiting principle." *Wilson*, 471 U.S. at 268. To characterize a federal claim, the courts look to "the elements of the cause of action, and Congress' purpose in providing it." *Wilson*, 471 U.S. at 268.

This Court in *North Star Steel* answered the question of whether to borrow state or federal law for WARN Act claims by choosing state law as the appropriate vehicle for borrowing purposes. Even with this Court's guidance in *North Star Steel*, however, the Eighth Circuit failed to follow the analytical process set forth in *Wilson*, *Agency Holding*, and *DelCostello* when it concluded that Respondents' WARN Act claims were more closely analogous to Missouri breach of contract actions than to claims arising under the Missouri Wages and Hours Act. While citing both *Wilson* and *Agency Holding*, the court of appeals wholly failed to apply the principles set forth in those cases to Respondents' WARN Act claims. It did not engage in any substantial analysis of Respondents' claims, failed to analogize the claims in any meaningful manner and misconstrued the purposes of the respective statutes. It compounded its errors by wholly failing to analyze the elements of the causes of action of the statutes at issue.

A. The Eighth Circuit Failed To Characterize Accurately The Essence Of Respondents' WARN Act Claims.

In *North Star Steel*, this Court stated that the statute of limitations for WARN Act claims must be borrowed from the "most closely analogous" state law source. 115 S.Ct. at 1929-30. Coupled with this Court's admonition in *Wilson* that in, determining which state statute of limitations to borrow for a federal cause of action, the courts must first define "the essence of the claim in the pending case, and decide which state statute provides the most appropriate limiting principle," the task before the Eighth Circuit was to identify the state cause of action whose essence is most closely analogous to that of the WARN Act. While recognizing that its duty was to characterize the essence of Respondents' claim, the Eighth Circuit proceeded to perform nothing more than a perfunctory analysis of claims arising under the WARN Act, the Wages and Hours Act and the common law prohibition against breaches of contract.

The enforcement provisions of the WARN Act make clear that, at its essence, a WARN Act claim is one for recovery of wages, or back pay. The statute provides for recovery of up to sixty days "*back pay*" based upon the "regular rate received" by the employee and offset by "any *wages* paid by the employer to the employee for the period" of sixty days. 29 U.S.C. § 2104(a) (emphasis added). This characterization is confirmed by other federal courts' interpretation of the enforcement provisions of the statute. In *Carpenters Dist. Council v. Dillard Dept. Stores, Inc.*, 15 F.3d 1275, 1278 (5th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 933 (1995), for example, the Fifth Circuit held that WARN Act "damages *essentially are wages* to which employees would have received had proper notice been given." *See also Staudt v. Glastron, Inc.*, No. SA-92-CA-1174, 1995 WL 701406 (W.D. Tex. 1995) (concluding that "[e]ssentially the WARN Act creates a federal civil cause of action against an employer for back pay. . . ."); *Halkias v. General Dynamics*

Corp., No. 4:92-CV-860-A (N.D. Tex. Oct. 3, 1995) (concluding that "[w]hen an employer violates WARN, the employer becomes indebted to the employee for 'back pay' "); *Automobile Mechanics' Local No. 701 of the Int'l Assoc. of Machinists & Aerospace Workers v. Santa Fe Terminal Services, Inc.*, 830 F. Supp. 432, 435-36 (N.D. Ill. 1993) (holding that under the WARN Act, "there is basically only one type of claim, a damages claim for lost wages and benefits for failure to provide notice" and also noting that "[t]here should not be a problem of having too many analogies to choose from under state law").[4]

Given the very language of the WARN Act itself, which labels the damages available for violations of its obligations as "back pay," 29 U.S.C. § 2104(a)(1)(A), the Eighth Circuit's conclusion that a WARN Act action "is not a claim for backpay," (Pet. App. 9a), is both surprising and patently erroneous. The Eighth Circuit's interpretation of the statute is at odds with the language and the plain meaning of § 2104(a)(1)(A) and the rule of statutory construction that a straightforward reading of a congressional enactment is preferred over one which would make the language of the statute superfluous. *United Food & Commercial Workers Local 751 v. Brown Group, Inc.*, __ U.S. __, 116 S. Ct. 1529, 1532 (1996) ("the more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law"). Congress labeled WARN Act recovery as "back pay" and any contrary interpretation of that language, such as that the court of appeals made, is directly antithetical to

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4. This interpretation is further supported by the Missouri courts' characterization of WARN Act payments to employees as "wages" rather than "severance pay" under the state's unemployment compensation system. *Division of Employment Security v. Labor & Industrial Relations Comm.*, 884 S.W. 2d 399 (Mo. App. 1994); *Labor & Industrial Relations Comm. v. Division of Employment Security*, 856 S.W. 2d 376 (Mo. App. 1993).

the very terms of the statute. The essence of a WARN Act claim is what Congress defined it to be: back pay.

The Eighth Circuit's initial failure to characterize correctly the essence of the Respondents' claim fatally flawed its further analysis of the most analogous state statute of limitations. Because the essential character of WARN Act claims is that they are claims for backpay or wages due, the only statute in Missouri which is even remotely analogous is the Missouri Wages and Hours Act. The Wages and Hours Act provides the *only* action in Missouri similar to a statutory claim for wages and benefits allegedly due. In fact, the very purpose of § 290.110 is to provide for the prompt payment of unpaid wages. Mo. Rev. Stat. § 290.110. That section, like the WARN Act, provides for a method of civil enforcement to collect wages and backpay when such wages are withheld. The enforcement provision of § 290.110 provides precisely the same remedy available under the WARN Act: sixty days payment of wages. Mo. Rev. Stat. § 290.110. In addition, § 290.100 of the Wages and Hours Act mirrors the warning requirement of the WARN Act by requiring covered employers to provide employees with thirty days written notice of reduction in wages. Mo. Rev. Stat. § 290.100.

The Eighth Circuit, however, discounted these provisions as mere "technical similarities" (while admitting that these provisions "resemble some of WARN's provisions") between the WARN Act and the Wages and Hours Act. (Pet. App. 10a). The court of appeals summarily concluded, without any analysis or support, that the provisions of the Wages and Hours Act were "considerably narrower than WARN." (Pet. App. 9a).

Contrary to the Court of Appeals' opinion, the similarities between the Wages and Hours Act's provisions and those of the WARN Act are more than "technical." Sections 290.100 and

290.110 impose upon employers affirmative obligations similar to those imposed upon employers by the WARN Act. They also create substantive rights in employees which may be vindicated through civil enforcement, just as the WARN Act creates substantive rights which may be enforced in the same manner. The affirmative obligations and substantive rights created by the Wages and Hours Act and the WARN Act are essentially the same. These obligations and rights are, in both statutes, part of a comprehensive scheme to insure that workers are notified of changes in their working conditions and the prospective loss of wages and, although the obligations imposed may differ slightly, the basic character of the claims is identical.

In contrast, the cause of action which the Eighth Circuit found more closely analogous — breach of contract — shares no similarities, technical or otherwise, with WARN Act claims. A common law cause of action for breach of an express or implied contract is not even necessarily labor- or employment-related. In fact, with the exception of collective bargaining agreements, breach of contract actions generally relate to commercial litigation rather than employer/employee relationships. The issue at the heart of Respondents' claim — or any WARN Act claim — is not commercial but employment related. The Eighth Circuit's engrafting of a commercial law statute of limitations on an action which is essentially one relating to employment is justified only by the lower court's strained analogy and not by any reasoned thinking. A breach of contract claim is nothing more than a generalized common law cause of action.

As justification for its application of a breach of contract statute of limitations, the Eighth Circuit reasoned that because the WARN Act imposes upon employers an obligation to continue to employ its workers for sixty days after notice, it "in a sense" "inserts additional terms into covered employment contracts." (Pet. App. 11a). The fallacy behind this reasoning is

that *every* federal statute imposes an obligation on some person or class of persons; yet a state breach of contract limitations period is not imposed upon every federal statute which does not contain a specific statute of limitations. The Eighth Circuit's reasoning, taken to its logical extreme, would require the application of breach of contract limitations periods to all federal causes of action, an approach which has never been utilized.

In rejecting the analogy of the Wages and Hours Act's provisions as too "narrow," the court of appeals went to the opposite extreme and analogized it to a common law cause of action which is so broad as to be meaningless. More fundamentally, the lower court failed to make any comparison of the statute it applied and the statute it rejected as analogies to the WARN Act, perhaps because such a comparison would have compelled an application of the Wages and Hours Act's statute of limitations. However much the Eighth Circuit discounted the similarities between the Wages and Hours Act and the WARN Act and dismissed them as "technical," no such similarities exist at all with respect to the common law cause of action for breach of contract the lower court applied. The appeals courts' characterization of Respondents' WARN Act claims, because it is not based on any principled analysis, is erroneous and merits review.

B. The Eighth Circuit Failed To Analyze Accurately The Purposes Of The WARN Act And The Wages And Hours Act.

In determining the essence of a federal claim, this Court has held that the purpose behind the federal statute and the inequity Congress attempted to redress in the statute must be examined. *Lampf, Plevka*, 501 U.S. at 357; *Reed*, 488 U.S. at 325-26; *Wilson*, 471 U.S. at 275; *Burnett v. Grattan*, 468 U.S. 42 (1984). The Eighth Circuit in this case gave scanty attention to this

requirement and premised its erroneous conclusion on an overly technical interpretation of the purposes of the respective statutes. The court of appeals held that §§ 290.100 and 290.110 of the Wages and Hours Act "do not address WARN's primary purpose, namely to notify employees about prospective employment loss and to give them time to prepare for impending economic dislocation." (Pet. App. 9a). By the same logic, of course, a cause of action for breach of contract does "not address WARN's primary purpose" by providing for notification of employees about prospective employment loss and by giving them time to prepare for impending economic dislocation; indeed such a general cause of action has nothing whatsoever to do with "prospective employment loss." The Eighth Circuit, however, did not make this simple logical corollary. It premised its analysis instead on a distorted perception of this Court's borrowing analysis.

The purpose of the WARN Act is to "provide[ ] workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary to enter skill training or retraining that will allow these workers to successfully compete in the job market." 20 C.F.R. § 639.1(a) (1994). Thus, the statute's goal is to protect both individuals and their communities from managerial practices which deprive workers of their livelihood. The purposes and goals of the WARN Act were preceded, at least in Missouri, by those of the Wages and Hours Act. In *McLaurin*, the Missouri Court of Appeals explained that § 290.110 and the other provisions of the Wages and Hours Act were enacted because "[i]t was recognized that to deprive [workers] of their wages for an unreasonable length of time would not only impoverish them and their families, but would tend to make them the objects of public charity, and therefore be injurious to the community as a whole." 355 S.W.2d at 363. In explaining the purpose behind another provision of the Wages and Hours

Act, § 290.080, the Missouri Supreme Court held, "This court takes judicial notice of the fact that a very large majority of the people of this country are now and probably always will be compelled to earn their livelihood 'by the sweat of their brow'; consequently the all-important question to most people is how to obtain work and the wages which work brings." *State v. Missouri Pacific Railroad Co.*, 242 Mo. 339, 147 S.W. 118, 120 (1912).

It is difficult to imagine how two statutes — one state and one federal — could have goals which are more similar in purpose than those of the WARN Act and the Missouri Wages and Hours Act. Both statutes are designed to provide advance notice to workers of pending changes in their employment status and both provide for recovery of wages where they have been wrongly denied. Both statutes seek to protect individual workers from their employers' decisions to deprive them of their livelihood and both recognize, as the Missouri Supreme Court stated, that "the all-important question to most people is how to obtain work and the wages which work brings." Both statutes also seek to enable terminated workers to reenter the labor market quickly without significant financial loss, and both recognize the burden such loss entails not only to the workers, but to their families and communities as well. Indeed, the purpose of the Wages and Hours Act coincides exactly with the purpose stated by Congress when it drafted the WARN Act's civil enforcement provisions: that recovery should mirror the recovery available had the aggrieved employees continued to work throughout the notice period but not been paid. *See Agency Holding*, 483 U.S. at 149 (similar civil enforcement provisions justified application of statute of limitations for Clayton Act violations to violations of Racketeering Influenced and Corrupt Organizations Act).

While magnifying the minor dissimilarities between the

WARN Act and the Wages and Hours Act, the Eighth Circuit ignored the divergent goals between a breach of contract cause of action and a WARN Act claim. In fact, it did not engage in any comparison between the purposes of a statutory WARN Act claim and the purposes of a non-statutory common law claim for breach of contract. Had the lower court performed such a comparison, it would have discovered that the differences it noted with respect to the Wages and Hours Act and the WARN Act are equally applicable to claims for breach of contract, while the similarities between the purposes and provisions of the Wages and Hours Act and the WARN Act do not exist at all with respect to a common law claim for breach of contract. Thus, a breach of contract action does not "protect[ ] employees from unscrupulous employers who withhold wages that the employer earned before their discharge," nor does it provide recovery of "benefits such as vacation pay." Nor does a breach of contract action generally provide for penalties, as do both the Wages and Hours Act and the WARN Act. In fact, a common law breach of contract action does not address *any* of the purposes underlying the notice and recovery provisions of the WARN Act.

The Eighth Circuit's reasoning is difficult to reconcile with the clear purpose of the notice and recovery provisions of the Wages and Hours Act. The thirty-day reduction in pay notice provision of the Wages and Hours Act was obviously designed to notify employees about prospective changes in their earning ability and to give them time to prepare for impending economic changes, just as the court of appeals recognized that the WARN Act's notice provision was. *See also United Paperworkers Int'l Union v. Specialty Paperboard, Inc.*, 829 F. Supp. 671, 674 (D. Ver. 1992) (noting that "the main purpose of the WARN Act is to provide an employee with advance notice of his or her employer's planned major personnel actions"), *aff'd*, 999 F.2d 51 (2d Cir. 1993) (concluding that the purpose of the WARN Act

is to "protect[ ] workers from unexpected joblessness or loss of hours"). The only reasonable characterization of Respondents' WARN Act claims for purposes of state law borrowing is under the Missouri Wages and Hours Act.

C. The Eighth Circuit Failed To Compare The Elements Of The Claims At Issue.

The Eighth Circuit's decision is also erroneous because it refused to engage in any comparison of the elements of the causes of action at issue, an exercise which this Court has held to be essential in determining the most closely analogous state law statute of limitations for a federal cause of action. *Wilson*, 471 U.S. at 268-69; *Lampf, Plevka*, 501 U.S. at 357. In *Wilson*, this Court held that "[t]he characterization of [a federal claim] for statute of limitations purposes is derived from the *elements* of the cause of action, and Congress' purpose in providing it," *Wilson*, 471 U.S. at 268-69 (emphasis added). In *Lampf, Plevka*, this Court held that "[a]lthough considerations pertinent to this determination will necessarily vary depending on the federal cause of action and the available state and federal analogues, such factors as commonality of purpose and similarity of elements will be relevant." 501 U.S. at 356-57.

The court of appeals, like the district court, did not even consider the elements of the respective causes of action at issue in determining the essential character of WARN Act claims. Any such comparison would have illustrated clearly that the analogy of a WARN Act claim to a breach of contract claim is really no analogy at all and that claims brought pursuant to the Wages and Hours Act are at their essence the closest to WARN Act claims. Because the WARN Act is a unique statutory creation, its elements reflect none of those necessary to allege a breach of contract action. In Missouri, in order to state a cause of action for common law breach of contract, a plaintiff must allege: "(a) the making and existence of a valid and enforceable

contract between the plaintiff and the defendant, (b) the right of the plaintiff and the obligation of the defendant thereunder, (c) a violation thereof by the defendant, and (d) damages resulting to the plaintiff from the breach." *Gilomen v. Southwest Missouri Truck Center*, 737 S.W. 2d 499, 500-01 (Mo. App. 1987). In addition, a valid and enforceable contract requires offer, acceptance and consideration. *Id.* Not one of these elements is necessary to state a claim under the WARN Act. The WARN Act does not require a plaintiff to allege offer, acceptance, consideration, obligation of the defendant, violation of the obligation or damages.

To state a cause of action under the WARN Act, the plaintiff need only allege a covered employment loss and a failure to provide sixty days notice or sixty days wages. 29 U.S.C. §§ 2102, 2104. No damages need be alleged, because an employee is entitled to receive sixty days wages or sixty days notice regardless of whether that employee was damaged in any way by lack of notice or worked at another job. In fact, none of the traditional indicia of contract are present in a WARN Act claim because the employer is under a unilateral obligation to provide sixty days notice or sixty days pay without any corresponding obligation on the part of the employee. The WARN Act lacks the fundamental essence of a contract: the mutual agreement of the parties to perform their promises.

In contrast, the elements necessary to state a cause of action under §§ 290.100 and 290.110 of the Missouri Wages and Hours Act, because it is a statutory creation like the WARN Act, are the same: that an employer is covered by the statute and that the notice or payment provisions of the statute were violated. A Wages and Hours Act plaintiff, like a WARN Act plaintiff, need not allege damages, because, like the WARN Act, those are assessed against the employer up to sixty days wages without regard to the actual monetary loss of the employee. And, like a

WARN Act plaintiff, a Wages and Hours Act plaintiff is under no obligation to allege offer, acceptance, consideration, mutuality of obligation, or the making and existence of mutual promises. This comparison of the elements of the causes of action, an exercise the Eighth Circuit failed to engage in, serves only to accentuate the incompatibility between a WARN Act claim and the common law breach of contract action the court of appeals and the district court applied.

The Eighth's Circuit's flawed reasoning is contrary to the analytical framework this Court has established to determine the most closely analogous statute of limitations for federal causes of actions. Had the Eighth Circuit utilized the process consistently applied by this Court, it could have reached no other conclusion than that the Wages and Hours Act provides the closest state law analogy to the WARN Act and that its statute of limitations was applicable.

III.

THE EIGHTH CIRCUIT'S REASONING IS INCONSISTENT WITH THE PRINCIPLES OF FEDERALISM.

The Eighth Circuit's attempt to force a contract analogy on WARN Act claims is both internally inconsistent and at odds with the precepts which protect the states' ability to regulate employment policy within their borders. The court of appeals held that "in a sense," the federal statute "inserts additional terms into covered employment contracts." (Pet. App. 11a). This was the lower court's *only* analogy between WARN Act claims and breach of contract claims. The Eighth Circuit's reasoning, however, ignores the very language of the WARN Act which states:

> The rights and remedies provided to employees by this chapter are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this chapter shall run concurrently with any period of notification required by contract or by any other statute.

29 U.S.C. § 2105. Thus, there are no "employment contracts" "covered" by the WARN Act and clearly Congress intended that collective bargaining agreements — or other employment contracts, including shut down agreements — would not be affected by the statute. Any breaches of such contracts, in any event, would be governed by the six-month statute of limitations applicable to claims brought pursuant to § 10(b) of the NLRA. *DelCostello v. Teamsters*, 462 U.S. 151, 155 (1983).

The Eighth Circuit's opinion is also factually flawed because it ignored the undisputed fact that, in this case, the *only* employment contract between the parties to this litigation was a collective bargaining agreement between Brown Shoe and Respondents' union. Thus, even if the WARN Act, as the court of appeals concluded, "inserts additional terms into covered employment contracts," the only contract into which it could have inserted additional terms in this case was the collective bargaining agreement which covered the Respondents' employment at the Dixon plant. Again, any breaches of that contract would have been governed not by the five-year statute the court of appeals applied, but by the six-month limitations period set forth by this Court in *DelCostello*. Because of this Court's ruling in *North Star Steel*, however, the six-month statute of limitations of the NLRA is not applicable to

Respondents' claims. Therefore, a contract limitations period is equally inapplicable. It is inequitable to refuse to apply the six-month statute of limitations for breaches of the only written contract between these parties on one hand and on the other hand assert that the WARN Act inserts additional terms into that contract and apply a five-year breach of contract statute of limitations to those "additional terms."

The Eighth Circuit's conclusion that the WARN Act creates an implied employment contract or "inserts additional terms into covered employment contracts" also damages the balance between the federal and state systems of labor law. In Missouri, workers are employed at will and may be discharged or resign at any time without cause. *Dake v. Tuell*, 687 S.W. 2d 191, 193 (Mo. 1985 en banc). The Missouri legislature, through its refusal to modify the at-will status of employees not covered by written employment contracts, has determined that no "implied contract" can be read into a worker's relationship with his or her employer.[5] The Eighth Circuit's holding, by implying a contract, or "additional terms to covered employment contracts," erodes the state's policy that no such contracts may be implied. It thus abrogates Missouri's status as an at-will employment state. As the Second Circuit noted in *United Paperworkers Int'l Union v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1993), "If the Court were to read an implied contract into the language of the [WARN] Act, there is no reason

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5. The only exception to Missouri's at-will employment policy is the court-created public policy exception, which, the Missouri courts have held, must be construed *narrowly*. *Lay v. St. Louis Helicopter Airways, Inc.*, 869 S.W. 2d 173 (Mo. App. 1993); *Yow v. Village of Eolia*, 859 S.W. 2d 920, 922 (Mo. App. 1993); *Luethans v. Washington University*, 838 S.W. 2d 117, 119 (Mo. App. 1992). There is no general wrongful discharge policy in Missouri and, with respect to the public policy exceptions, the Missouri courts have issued no written opinions on the appropriate statute of limitations applicable to such actions.

why every statute should not be read that way. The effect would be widespread — hundreds of statutes would be interpreted to create legally enforceable contract rights." (quoting *Russell v. District of Columbia*, 747 F. Supp. 72, 79 (D.C.C. 1990), *aff'd*, 984 F.2d 1255 (D.C. Cir. 1993). The inference of such legally enforceable rights would effectively eliminate the at-will status of employees in Missouri.

Absent clear congressional intent to preempt, the federal courts may not presume that a federal law supersedes state law in traditional areas of state regulation. *Medtronic, Inc. v. Lohr*, __ U.S. __, 116 S. Ct. 2240 (1996); *Hillsborough Co. v. Automated Medical Laboratories, Inc.*, __ U.S. __, 105 S. Ct. 2371 (1985); *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218 (1947). As recently as June of this year, this Court stated, "[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic*, __ U.S. at __; 116 S. Ct. at 2250. There is no evidence in the WARN Act that Congress intended to preempt a state's employment-at-will doctrine. Yet this is precisely what the Eighth Circuit's opinion does. By analogizing a WARN Act claim to a contract statute of limitations, the court of appeals has created an implied contractual right of action which is contrary to Missouri law.

In fact, the Missouri legislature has enacted at least one provision which does cover written employment contracts. Mo. Rev. Stat. § 290.130. That provision, however, is contained in the **Wages and Hours Act**.[6] Thus, even if the reasoning of the

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6. Section 290.130 states:

> Any such servant or employee whose employment is for a definite period of time, and who is discharged without cause before the expiration of such time, may,

(Cont'd)

Eighth Circuit is correct — that the WARN Act creates an obligation, or implied contract, on the part of employers to continue to employ their workers for sixty days after notice of an impending plant closing or mass layoff — then the closest *contract* analogy is the one contained in the Wages and Hours Act and *not* in the common law breach of contract action the lower court applied. Even under the Eighth Circuit's own reasoning, therefore, the Wages and Hours Act is the most analogous state statute to the WARN Act and its limitations period is applicable.

By failing to engage in even minimal comparison of the statute at issue in this case with respect to their provisions, purposes and elements, the Eighth Circuit misconstrued this Court's precedent. By inferring contract terms in the provisions of the WARN Act, the court of appeals eliminated the State of Missouri's traditional right to set employment policy within its borders and eroded the state's at-will employment doctrine. The Eighth Circuit's failure to follow this Court's precedent and its abrogation of traditional state's rights is reversible error and should be corrected by this Court. The petition should also be granted to provide the lower courts with additional guidance on a uniform characterization of WARN Act claims.

(Cont'd)

> in addition to the penalty prescribed by this law, have an action against any such employer for any damages he may have sustained by reason of such wrongful discharge, and such action may be joined with and an action [under § 290.110] for unpaid wages and penalty.

CONCLUSION

For the reasons state above, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

JAMES N. FOSTER, JR.
Counsel of Record
MICHELLE M. CAIN
McMAHON, BERGER, HANNA
LINIHAN, CODY & McCARTHY
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131
(314)567-7350

APPENDIX A — ORDER BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED MAY 30, 1996

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2069EMSL

Sherry Aaron, et al.,

Appellees,

vs.

Brown Group Inc., etc.,

Appellant.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 30, 1996

Order Entered at the Direction of the Court:
s/ Michael E. Gens
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED APRIL 6, 1996

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95-2069

Sherry Aaron; Deborah D. Barber; Dolores V. Beauchamp; Patricia Beauchamp; Brenda Becker; Eva M. Becker; Alice M. Cox; Billi Jo Crews; Betty Doyle; Patty Dull; Jessie F. Dunlap; Lois I. Elseman; Augusta Emmons; Cathy M. Ethington; Carol J. Foster; Joseph E. Foster; Virginia M. Foster; Donald Fritchey; Melissa C. Galbraith; Cristel Goodman; Lola F. Harlan; Lucinda R. How; Frances Huffman; Shirley Humphrey; Sharon L. Hurst; Brenda Kissinger; Edith Krull; Daisy L. Maddox; Gladys McNew; Rita Messersmith; Anna M. Miller; Kathryn Warnol Mitchell; Dorothy Newkirk; Beverly J. Norton; Eugenia S. Plotner; Becky Jo Ray; Erika K. Rea; Helen J. Rea; Brenda K. Reedy; Debbie Rhew; Phyllis Rice; Clifford E. Robertson; Kimberly Rollins; Mary Rollins; Troy Rollins; Virginia Rollins; Jane A. Ruhl; Nina L. Scrabeck; Mary K. Sherrell; Jerry R. Stricklan; Brenda S. Stricklan; Patricia Strickland; Phyllis J. Teel; Linda J. Tucker; Darlene Vineyard; Lula D. Wesser; Patricia Wiles; Allie Willis; Joann Wilson; Thelma Withers; Cynthia Wyss; Marshall Wyss; and Marion M. York, on behalf of themselves and similarly situated aggrieved employees; Laverne Akery; Tina S. Alexander; Etta W. Anderson; Leona Asberry; Ida Fae Baker; Michael Beasley; Dennis Beasley; S. Dianne Beasley; Tammy Beasley; Patricia Lynn Byrd; Eula Mae Cochran; Dolores Colby; Beth Davis; Charline Davis; Tim Davis; Belinda Decker; Shirley Sue Edwards; Raymond E. Edwards; Glenda K. Emmons; Fritchey; Jessie Gilbert; Richard Gilbert; Millie Hardwick; Shirley Kizer; William Lane; Martha

Appendix B

Messersmith; Alice Mitchell; Jerry Nelson; Ruth A. Parker; Sharon K. Ray; Dianna Rollins; Caroline Sharp; Samuel Sharp; Bob E. Spurgeon; Elsie Spurgeon; Wanda J. Van Scoy; Sandra White; Ruth Wilson; Sharron K. Yoakum; Martha J. Baker; Edna Cousart; Carolyn J. Evans; Linda A. Glick; Douglas E. McClendon; Patricia McClendon; and Carolyn S. Prock,

Appellees,

v.

Brown Group, Inc., doing business as Brown Shoe Company,

Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: February 15, 1996

Filed: April 6, 1996

Before BEAM, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Pursuant to the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101-2109, the plaintiffs, on behalf of themselves and similarly-situated individuals, sued their former employer, the Brown Shoe Company ("Brown Shoe"). Brown Shoe moved to dismiss the

case on statute of limitations grounds, but the district court[1] denied the motion. The district court then certified the case for interlocutory appeal, and this appeal followed. We affirm.

I.

WARN requires certain employers to give affected employees sixty days' notice before closing a plant or beginning a mass layoff. 29 U.S.C. § 2102(a). If an employer violates WARN, it is liable to each aggrieved employee for wages and benefits for each day of the violation (for up to sixty days). 29 U.S.C. § 2104(a)(l). The statute is enforced by way of a civil action brought by employees. 29 U.S.C. § 2104(a)(5). Like many federal laws, WARN does not include a statute of limitations.

The plaintiffs worked as unionized employees at Brown Shoe's plant in Dixon, Missouri. Brown Shoe notified William Treece, a representative of the United Food and Commercial Workers International Union, that the Dixon plant would be closed and that workers would be dismissed in sixty days. Three days later, Brown Shoe began laying off plant employees, and the layoffs continued until the plant closed two months later.

A little more than two years after Brown Shoe notified Mr. Treece about the plant closure, the plaintiffs filed this action, alleging that Brown Shoe violated WARN. They claimed that the notice of the plant closure was inadequate because Mr. Treece was not their exclusive representative, 29 U.S.C. § 2102(a)(1), 20 C.F.R. § 639.6, and that the layoffs effectively constituted an unlawful plant closure, 29 U.S.C. § 2101(a)(2). They sought wages and benefits for each day of the violation.

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1. The Honorable Terry I. Adelman, United States Magistrate Judge for the Eastern District of Missouri, acting by consent of the parties. *See* 28 U.S.C. § 636(c)(1).

Brown Shoe then moved to dismiss the action, arguing that it was time-barred by the National Labor Relations Act's (NLRA) six-month statute of limitations, 29 U.S.C. § 160(b), or, alternatively, by Missouri law's one-year limitations period for penal statutes, Mo. Rev. Stat. § 290.110, § 516.380. The district court denied the motion. The court first found that there was no reason to depart from the well-established presumption that federal courts should borrow a statute of limitations from state law when a federal statute does not include a limitations period. The court then held that the action was not time-barred because Missouri's five-year statute of limitations for actions on express and implied contracts, Mo. Rev. Stat § 516.120(1), applied to WARN claims.

II.

In the time since the district court's decision, the Supreme Court has resolved one significant issue in this case. In *North Star Steel Co. v. Thomas*, 115 S. Ct. 1927, 1931 (1995), the Court held that federal courts should apply the most appropriate state statute of limitations to WARN claims. The Court specifically rejected the argument, made by Brown Shoe below, that the NLRA's six-month limitations period should apply to WARN claims. *Id.* The Court, however, did not find it necessary to decide which state limitations period should apply because the action was timely under any of the four possibly applicable Pennsylvania statutes of limitations and because none of the statutes (ranging from two to six years) would undermine the purpose of WARN. *Id.*

On appeal, Brown Shoe renews its argument that this case is barred by the one-year limitations period applicable to actions under the Missouri wage and hour statutes. In the alternative,

Brown Shoe argues that we should apply the Missouri equal pay statutes' six-month limitations period, Mo. Rev. Stat. § 290.450, or the federal Fair Labor Standards Act's (FLSA) two-year statute of limitations, 29 U.S.C. § 255(a); *see also* Mo. Rev. Stat. § 516.140.

III.

When borrowing a state statute of limitations for a federal cause of action, our first task is to "characterize the essence of the claim in the pending case." *Wilson v. Garcia*, 471 U.S. 261, 268 (1985). The characterization of a claim is a question of federal law. *Johnson v. State Mut. Life Assurance Co.*, 942 F.2d 1260, 1262 (8th Cir. 1991) (*en banc*). We next determine what state cause of action is most closely analogous to the federal claim. *Id.; see also Egerdahl v. Hibbing Comm. College*, 72 F.3d 615, 617 (8th Cir. 1995). State policy becomes relevant only after we have selected the most closely analogous state cause of action. At that point, we defer to the state's judgment about how to balance the need to enforce the statute with the need to weed out stale claims, by borrowing the statute of limitations for the most closely analogous state cause of action, unless that statute would frustrate the purposes of the federal statute on which the claim is based. *North Star Steel*, 115 S. Ct. at 1930-31.

A.

Brown Shoe first suggests that the application of a five-year limitations period to WARN frustrates a federal policy favoring short statutes of limitations for labor-related claims. Brown Shoe claims that federal courts, including this court, consistently borrow short statutes of limitations for labor-related legislation. As additional evidence of this policy, Brown Shoe also cites

several federal statutes that require aggrieved employees to file claims within six months or less. *See, e.g.*, NLRA, 29 U.S.C. § 160(b) (six-month statute of limitations for filing unfair labor practice claims with National Labor Relations Board), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e)(1); Age Discrimination in Employment Act, 29 U.S.C. § 626(d)(1); and Americans with Disabilities Act, 42 U.S.C. § 12117(a) (all stating that employee must file employment discrimination charge with the Equal Employment Opportunity Commission within 180 days).

We find Brown Shoe's assertion that Congress and the federal courts have established a federal policy favoring short limitations periods for labor-related claims doubtful at best. We need not undertake the extensive review of federal labor policy necessary to resolve that issue, however, because the Supreme Court has held that a limitations period *longer* than the five years applied by the district court below would not frustrate WARN's purposes. In *North Star Steel,* the Court stated that "even the longest of the periods, six years, is not long enough to frustrate the interest in a relatively rapid disposition of labor disputes." 115 S. Ct. at 1931 (internal quotation marks omitted).

Brown Shoe also argues that Missouri favors short limitations periods for labor-related claims. Such a state policy, if it indeed exists, is irrelevant to our task of determining which state claim is most closely analogous to the plaintiffs' WARN claims. As we indicated above, the classification of a federal claim for statute of limitations purposes is a question of federal, not state, law. *Johnson,* 942 F.2d at 1262. "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Wilson,* 471 U.S.

at 269. It is only after we classify the federal claim and determine which state cause of action is most closely analogous to it that we defer to state law. Missouri certainly may decide to curtail the time for vindicating certain types of claims, but we reject Brown Shoe's invitation to allow those decisions to influence our classification of the claim at issue in this case.

B.

We turn now to Brown Shoe's assertion that the Missouri wage and hour statutes' one-year limitations period should be applied to WARN claims. Brown Shoe focuses on two provisions of the wage and hour statutes in particular, namely, Mo. Rev. Stat. § 290.100 and § 290.110. Brown Shoe believes that these provisions effectuate the same policy as WARN, that is, to "provide[ ] workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market." 20 C.F.R. § 639.1(a).

Brown Shoe is right that the provisions to which it points resemble some of WARN's requirements. Mo. Rev. Stat. § 290.100 requires employers to notify their employees thirty days before reducing their wages. If the employer fails to give proper notice, it must pay $50 to each affected employee. Mo. Rev. Stat. § 290.110 requires employers to pay discharged employees all back pay promptly. If the employer withholds the back pay more than a week after the employee requests it, the employee is entitled to continue to collect wages for up to sixty days (or until he or she is fully compensated for his or her services).

We do not share Brown Shoe's view, however, that these technical similarities compel us to apply the Missouri wage and hour statutes' limitations period to WARN. The Missouri wage and hour statutes are considerably narrower than WARN. Most importantly, the provisions cited by Brown Shoe do not address WARN's primary purpose, namely, to notify employees about prospective employment loss and to give them time to prepare for impending economic dislocation. The Missouri wage and hour statutes differ from WARN in other important ways as well. Mo. Rev. Stat. § 290.110 protects employees from unscrupulous employers who withhold wages that the employees earned before their discharge. WARN, on the other hand, is not "a claim for backpay because it does not compensate for past services." *United Paperworker International Union v. Specialty Paperboard, Inc.*, 999 F.2d 51, 55 (2d Cir. 1993). Furthermore, the Missouri Supreme Court has held that an employee is not entitled to recover benefits such as vacation pay under Mo. Rev. Stat. § 290.110. *See Brackett v. Easton Boot & Shoe Co.*, 388 S.W.2d 842, 849 (Mo. 1965). WARN provides that employees are entitled to recover wages and benefits.

WARN is also unlike Mo. Rev. Stat. § 290.100. That provision's notice requirement applies only to changes in employment conditions (specifically, decreases in pay) that occur during an ongoing employment relationship. It does not apply after an employee is terminated. Furthermore, the $50 penalty for a violation is minuscule compared to WARN's penalty (full wages and benefits for up to sixty days). *See* Mo. Rev. Stat. § 290.100, 29 U.S.C. § 2104(a)(1).

C.

We also reject Brown Shoe's contention that either the

Missouri equal pay statutes' six-month limitations period or the FLSA's two-year limitations period should apply to WARN. The Missouri equal pay statutes make it unlawful to pay women less than men for substantially identical work. Mo. Rev. Stat. § 290.410, § 290.440. Despite Brown Shoe's assertion that the Dixon plant employed primarily women, we do not think that this case can properly be characterized as a disparate pay sex discrimination claim.

We believe that the Supreme Court precluded the application of the FLSA's statute of limitations in *North Star Steel Co.*, 115 S. Ct. at 1930-31, when it rejected the contention that the six-month statute of limitations applicable to claims under the NLRA was appropriate for WARN claims and held that the federal courts ought to look to state law for an appropriate limitations period. In any event, the FLSA is not closely analogous to WARN. Like the Missouri wage and hour statutes, the FLSA allows aggrieved employees to recover unpaid wages for past services; it does not provide the comprehensive relief included in WARN. 29 U.S.C. § 216(b); *see also United Paperworkers*, 999 F.2d at 55 (comparing WARN and FLSA). Furthermore, the FLSA is partially enforced by an elaborate administrative structure that helps workers protect their statutory rights. 29 U.S.C. § 211, § 216(c). WARN does not establish a similar administrative enforcement mechanism.

D.

Finally, we believe that the district court correctly concluded that Missouri's five-year statute of limitations for all "actions upon contracts, obligations or liabilities, express or implied," should govern WARN claims. Mo. Rev. Stat. § 516.120(1). By enacting WARN, Congress imposed upon

certain employers an obligation to notify their employees before laying them off or closing a facility. In a sense, WARN inserts additional terms into covered employment contracts. We therefore conclude that a WARN action is most closely analogous to an action to recover damages for a breach of an implied contract (or breach of an obligation) to notify employees before terminating them.

Although we are not bound by their results, our decision comports with two recent well-reasoned opinions from the Second and Tenth Circuits. In *Frymire v. Ampex Corp.*, 61 F.3d 757, 764 (10th Cir. 1995), the Tenth Circuit applied Colorado's three-year statute of limitations for contracts to WARN. In an opinion written by Judge Bright of this court, the court reasoned that "the WARN Act imposes a federal mandate upon employers that effectively obligates them as if bound by the terms of an employment contract." *Id.* Similarly, in *United Paperworkers*, 999 F.2d at 57, the Second Circuit applied Vermont's six-year statute of limitations for contract actions to WARN. The court concluded, "Like . . . a contract action, WARN actions in some sense compensate workers and communities for their reliance interests. Thus, we find an application of the contract limitations period best approximates the federal legislative intent." *Id.; see also Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192, 196-97 (E.D. Mich. 1993) (applying Michigan's contract limitations period to WARN).

Brown Shoe argues that we cannot analogize a WARN claim to a breach of contract action because Missouri is an "at-will" employment state. It reasons that because Missouri employers can generally fire employees or change employment conditions without cause, *Dake v. Tuell*, 687 S.W.2d 191, 193 (Mo. 1985) (*en banc*), the district court erred in holding that the contract

limitations period applied to WARN. We disagree. The fact that at-will employees in Missouri may not sue their employers for wrongful discharge — unless the discharge violates public policy, *id.*, *Luethans v. Washington Univ.*, 838 S.W.2d 117, 119-20 (Mo. Ct. App. 1992) — does not preclude us from finding that a WARN action is most closely analogous to a contract action. *See, e.g., Frymire*, 61 F.3d at 764 (applying contract limitations period even though Colorado is at-will employment state).

Furthermore, as the plaintiffs point out, the five-year statute of limitations applied by the district court below is not limited to contract claims. It covers actions for breach of an obligation as well, and the Missouri courts have held that Mo. Rev. Stat. § 516.120(1) governs actions based on an obligation created by a statute. *See Coleman v. Kansas City*, 173 S.W.2d 572, 577 (Mo. 1943), and *Barberi v. University City*, 518 S.W.2d 457, 458 (Mo. Ct. App. 1975) (both dealing with claims for additional compensation owed based on city ordinance).

IV.

Because the plaintiffs filed this action well within the applicable five-year statute of limitations, we affirm the decision of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI DATED NOVEMBER 23, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:94CV000207 TIA

SHERRY AARON, DEBORAH D. BARBER, et al.,

Plaintiffs,

v.

BROWN GROUP, INC. d/b/a BROWN SHOE COMPANY,

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on defendant's Motion to Dismiss. The parties consented to jurisdiction before the undersigned pursuant to 28 U.S.C. § 636(c).

Plaintiffs bring this claim for themselves and other similarly situated employees under the Worker Adjustment and Retraining Notification Act ("WARN"), Title 29 U.S.C. §§ 2101-2104. Plaintiffs allege they are entitled to wages and benefits because defendant failed to give an adequate 60 day notice required under the WARN Act when defendants began to layoff plaintiffs as part of a plant closing at defendant's facility in Dixon, Missouri. The Warn Act was enacted without a statute of limitations period. The

defendant contends the applicable statute of limitations for this action under the WARN Act is six (6) months. The defendant asks this Court to dismiss this action because it was filed after the alleged six month statute of limitations.

Allegations Made by Plaintiff

Plaintiffs complaint alleges the following facts:

Plaintiffs were employed at defendant's plant in Dixon, Missouri and they were members of United Food and Commercial Workers Union Local 751. On January 17, 1992 the defendant provided written notice of the permanent closing of the Dixon plant to William R. Treece, a representative of United Food and Commercial Workers International Union. This letter stated the plant was going to be closed and that employees would begin to be displaced in sixty days, on March 20, 1992. The letter stated the purpose of the sixty day notice was to comply with the WARN Act § 2102(a)(1) requirement that such notice be given to affected employees. Plaintiffs contend this notice did not meet the requirements of § 2102(a)(1) because Mr. Treece, who was served the notice, was not their exclusive representative.

On January 20, 1992, three days after issuing the plant closing notice, the defendant began laying off plaintiffs and similarly situated employees. The layoffs continued through February and March. Plaintiffs contend the cumulative effect of these layoffs constituted a constructive plant closing under § 2101(a)(2) that in turn violated § 2102(a) for failure to give adequate notice.

Plaintiffs allege since the appropriate notice of the plant closing was not given to them, they are entitled under

§ 2104(a)(1) to wages and benefits for sixty days. In the alternative, if it is found that the notice given to Mr. Treece was adequate, then plaintiffs seek wages and benefits for each day they were laid off prior to the expiration of the sixty day notice.

Plaintiffs filed this claim on January 31, 1994, approximately two years and two weeks from January 17, 1992, the date of defendant's letter to Mr. Treece informing him of the ensuing plant closing. The statute of limitations began to run at some point after January 17, 1992 when the actions of the defendant may have given rise to a claim under the WARN Act.

State or Federal Statute of Limitations

The Workers Adjustment and Retraining Notification Act was enacted without a specific statute of limitations period within which claims for violations of the Act must be filed. Under the WARN Act, employers of a facility that has more than 100 employees (excluding part-time employees) cannot order the plant closed or a mass layoff until after the end of a sixty day period after the employer serves a written notice of such a closure. § 2102(a).

The issue of what limitations period to apply to WARN claims has not been addressed in the Eighth Circuit. The question before the Court is whether to borrow an applicable statute of limitations for the WARN Act from a federal statute or from a state statute. The United States District Courts are split on this issue and to date three United States Circuit Courts of Appeals have ruled on this matter.[1]

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1. A fourth opinion *Halkias v. General Dynamics Corp.*, 31 F.3rd 229 (5th Cir. 1994) has been vacated and the mandate in the case stayed pending rehearing en banc.

Appendix C

The defendant contends the statute of limitations most applicable to WARN Act actions is the six month limitations period contained in section 10(b) of the National Labor Relations Act ("NLRA"). In the alternative, the defendant contends that if the court must use the state law's statute it should apply to one year statute that has been found applicable by the Missouri Courts for violations of § 290.110, RSMo (1994) (this statute sets forth the time frame within which discharged employees must be paid final wages and the penalties on employers for noncompliance).

The plaintiffs contend the correct applicable statute of limitations is the five year limit for express or implied contract actions, § 516.120, RSMo (1992).

Discussion

Where a federal statute does not contain an express statute of limitations the United States Supreme Court has "generally concluded that Congress intended that the Courts apply the most closely analogous statute of limitations under state law." *Reed v. United Transportation*, 488 U.S. 319, 323, 109 S.Ct. 621, 625, 102 L.Ed. 665 (1989) (quoting *DelCostello v. Int'l Bhd of Teamster*, 462 U.S. 151, 158, 103 S.Ct. 2281, 2287, 76 L.Ed. 476 (1983)). Yet on occasion an exception will apply,

> when a rule from elsewhere in the federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.

Id. (quoting *DelCostello*, 462 U.S. at 172, 103 S.Ct. at 2294).

The Supreme Court has emphasized the state-borrowing doctrine should not be lightly abandoned and restated the narrow exception cited above in *Reed. Lampf, Playa, Lipkind, Prupis & Petigrew v. Gilbertson*, __ U.S. __, 111 S.Ct. 2773, 2778, 115 L.Ed.2d 321 (1991) (citing *Reed*, 488 U.S. at 323).

The Supreme Court in *DelCostello* cautioned that when a federal statute lacks a limitations period, state law remains the norm for borrowing of limitations periods even though there isn't always an obvious state law choice for application. *DelCostello*, 462 U.S. at 171.

The Eighth Circuit has followed this principle and found Missouri law's statute of limitations to be applicable in causes of action under federal labor law. See *Johnson v. State Mutual Life Assurance Co.*, 942 F.2d 1260 (8th Cir. 1991) (the court held suits under §1132(a)(1)(B) of ERISA should be characterized as contract actions and borrowed an applicable Missouri statute's limitations period); *Marshall v. Local Union No. 6, Brewers and Maltsters and General Labor Departments*, 960 F.2d 1360 (8th Cir. 1992) (the court held the 5 year Missouri statute of limitations for personal injury actions was applicable to LMRDA/LMRA hybrid suits, rather than a 6-month federal statute of limitations.)

In a well reasoned opinion the Second Circuit held a WARN Act cause of action should borrow from a state limitations period and not a federal one because the *Reed* Court's narrow exception to this rule did not apply; no federal statute was clearly more analogous and the state's limitation period would not undermine federal policy. *United Paperworkers Int'l Union v. Specialty*

Paperboard, Inc., 999 F.2d 51, 54. The court distinguished the goals of the WARN Act and the NLRA. The purpose of WARN IS to alleviate the distresses associated with job loss for the workers and the community while the NLRA's purpose is to protect the collective bargaining process. *Id.* at 54. The court supported this conclusion in part based on a Supreme Court case which rejected a claim that the NLRA preempted a Maine plant closing law that was very similar to WARN; " 'Such regulation [a state-law plant closing notice requirement] provides protections to individual union and nonunion workers alike, and thus 'neither encourage[s] nor discourage[s] the collective-bargaining process that are the subject of the NLRA.' ' " *Id.* at 54 (quoting *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 20-21, 107 S.Ct. 2211, 2222-23, 96 L.Ed.2d 1 (1987). So too the WARN Act applies to all workers (whether union or nonunion) who are affected by a plant closing and gives individuals as well as unions the right to sue because of inadequate notice. 29 U.S.C. § 2104(a)(5).

The Second Circuit's opinion provides another reason why the NLRA and its section 10(b) six-month limitations period is not sufficiently analogous to the WARN Act to create an exception to the assumption a state limitations period should be applied. The NLRA has a "complex administrative structure in which the aggrieved person (usually a union) files a charge with the Board" where as WARN Act claims are brought by individual employees in court. *United Paperworkers Int'l Union v. Specialty Paperboard, Inc.*, 999 F.2d at 55. Thus, the need for court action with its attendant problems for individuals requires more time.

Further, the court in *Specialty Paperboard, supra*, held that applying a state law's limitations period to a WARN violation

does not impose an undue burden on an employer who has plants in several states. A WARN violation is limited to the employer's closing or mass layoff activity at each individual plant. 29 U.S.C. § 2101(a)(2). A law suit is limited to be brought either in the district where the plant is located or where the employer does business. 29 U.S.C. § 2104(a)(5). The advantage to forum shopping is thereby minimized and the employer has fair notice of which state law's may be applied to each plant.

In another well-reasoned opinion, the Third Circuit has held in *United Steelworkers of America v. Crown Cork and Steel,* 32 F.2d 53 (3rd Cir. 1994), that "for cases arising under WARN courts should apply the most **closely analogous state** statute of limitations." 32 F.2d 53, 54. The court reasoned that WARN had nothing to do with the collective bargaining process and is remedial in nature, thus the six-month statute of limitations under § 10(b) of the NLRA should not be applied. The court also held that WARN does not present any serious uniformity problems requiring the application of a single federal statute of limitations. The court thus found that no federal limitations provided a closer analogy to WARN and directly implicated an important federal interest — both are required before courts are authorized to depart from the state borrowing rule. *See United Mineworkers of America v. Peabody Coal Company,* 1994 WL 590188 (6th Cir. October 31, 1994).[2] In applying state statutes of limitations to this WARN case, the court stated as follows:

> Here the state statutes of limitation brought

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2. The undersigned realizes that the 6th Circuit has adopted the section 10(b) six-month statute of limitations in WARN cases. This court has determined, however, that it will rely on 2nd and 3rd Circuit cases which hold that section 10(b) of NLRA should *not* apply to WARN cases.

> to the lower court's attention . . . do not interfere with federal policy. Because of WARN's remedial nature and its limited effect on collective bargaining a short statute of limitations is unnecessary. And none of the state statutes are so short as to interfere with a worker's potential for seeking or gaining relief. While we acknowledge that none of the possible state laws provide perfect analogies to WARN, the absence of a perfect analogy is an insufficient reason to depart from the general rule, particularly when a federal law does not provide a satisfactory alternative. *Delcostello*, 462 U.S. at 171.

Steelworkers v. Crown Cork & Steel, 32 F.3rd 53, 61.

For these reasons the undersigned finds that the NLRA is not more analogous than state law and the six month limitations period of the NLRA § 10(b) is not applicable to WARN actions. Since there are no other federal statutes that would create the exception of federal borrowing, the normal borrowing procedure will be followed and an analogous state law will be applied.

Proper State Statute of Limitations

In determining what state statute of limitations to apply to a federal statute, courts must examine both the nature of the federal claim and the federal policy involved. *United Parcel Services Inc. v. Mitchell*, 451 U.S. 56, 60-61 (1981). In light of this inquiry there are two state statutes that are analogous to WARN cases.

Appendix C

The first is Missouri's five-year limitation for action on contracts. § 516.120(1) RSMo. Implicit in this assertion is the reasoning that "when an employer unilaterally and radically changes an employees terms and conditions of employment, he essentially is breaching that worker's employment contract." *Wallace v. Detroit Coke Corp.*, 818 F.Supp. 192 (E.D. Mich. 1993); *see also Frymire v. Amex Corp.*, 821 F.Supp. 651 (D. Col. 1993) (citing *Wallace, supra*, and applying Colorado's contract statute of limitations to award case). The undersigned concludes that this is the case even though Missouri is an "at will" employment state. *See Rosatone v. GTE Spring Communications*, 761 S.W.2d 670, 672 (Mo.App. E.D. 1988). As stated above, the absence of a perfect analogy is not a reason to depart from the general rule of borrowing state statutes of limitations. *See Delcostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983).

Another applicable statute of limitations is the five-year Missouri statute of limitations relating to suits upon a statute not penal in nature. § 516.120(2) RSMo. *See Wholesale and Retail Food Distribution Local 63 v. Sante Fe Terminal Services, Inc.*, 826 F.Supp. 326 (C.D. Cal. 1993) (adopting a statute of limitations that is identical in language to § 516.120(2)); *see also State ex rel Wingfield v. Kansas City*, 263 S.W.2d 516 (Mo. App. 1924) (applying former § 516.120(2) to the discharge of a civil service employee protected under civil service rules). Thus, the undersigned concludes that § 516.120(2) is a proper statute of limitations to apply in this case.

Defendant's argue that the one-year statute of limitations used for wages, hours and benefit laws, § 290.110 RSMo., should be applied. The undersigned concludes that this statute is penal in nature and is not analogous to the federal claim, and does not

further the federal policy involved in a WARN action. At least one court has refused to apply a statute of limitations for penal actions in WARN cases. *See Wholesale and Retail Food Distribution Local 63, supra*, 826 F.Supp. 326, 330-31, (the *Local 63* court reasoned that WARN is a remedial statute); (citing *Solberg v. Inline Corp.*, 748 F.Supp. 680, 685 (D. Minn. 1990)). WARN's purpose is to alleviate the distress associated with job loss for both workers and in the community in which they live. Thus, the court in Local 63 held that a penal statute of limitations was not the most analogous California limitation to apply in a WARN action.

The Missouri courts have interpreted § 290.110 to be penal in nature because it authorizes the award of additional wages as a penalty for failure to pay the unearned and unpaid wages of a discharged employee. *Slavin v. William C. Hass Co.*, 563 S.W.2d 157 (Mo. App. 1978). Because of the reasoning in the *Local 63* case *supra,* and because the statute operates as a penalty to employers, § 290.110 is inconsistent with the nature of the WARN claims. Therefore, it is not analogous and should not be applied.

Additionally, a one-year statute of limitations is inconsistent with the policy aims under WARN. A longer statute of limitations would provide employees with the time necessary to learn about their statutory rights, seek the assistance of counsel, organize it as a class, and find alternative employment.

Thus, for all the above reasons, the undersigned concludes that the proper statutes of limitations to apply are the five-year statute applicable to suits upon a statute not penal in nature, and the five-year statute of limitations for actions on a contract in Missouri.

Appendix C

Accordingly,

IT IS HEREBY ORDERED that defendant's Motion to Dismiss be DENIED.

s/ Terry I. Adelman
UNITED STATES MAGISTRATE JUDGE

Dated this 23rd day of November, 1994.

APPENDIX D — WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT 29 U.S.C. §§ 2101-2109

UNITED STATES CODE

CHAPTER 23 — WORKER ADJUSTMENT AND RETRAINING NOTIFICATION

§ 2101. Definitions; exclusions from definition of loss of employment

(a) Definitions

As used in this chapter —

(1) the term "employer" means any business enterprise that employs —

(A) 100 or more employees, excluding part-time employees; or

(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);

(2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part time employees;

(3) the term "mass layoff" means a reduction in force which —

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for —

(i)(I) at least 33 percent of the employees (excluding any part-time employees); and

(II) at least 50 employees (excluding any part-time employees); and

(III) at least 500 employees (excluding any part-time employees);

(4) the term "representative" means an exclusive representative of employees within the meaning of section 159(a) or 158(f) of this title or section 152 of Title 46;

(5) the term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer;

(6) subject to subsection (b) of this section, the term "employment loss" means (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period;

(7) the term "unit of local government" means any general

purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers; and

(8) the term "part-time employee" means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

(b) Exclusions from definition of employment loss

(1) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title. Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

(2) Notwithstanding subsection (a)(6) of this section, an employee may not be considered to have experience an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff —

(A) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment; or

(B) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

§ 2102. Notice required before plant closings and mass layoffs

(a) Notice to employees, state dislocated worker units, and local governments

An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order —

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act [29 U.S.C.A. § 1651 *et seq.*]) and the chief elected official of the unit of local government within which such closing or layoff is to occur.

If there is more than one such unit, the unit of local government

which the employer shall notify is the unit of local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made.

(b) Reduction of notification period

(1) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(2) (A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

(B) No notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.

(3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.

Appendix D

(c) Extension of layoff period

A layoff of more than 6 months which, at its outset, was announced to be a layoff of 6 months or less, shall be treated as an employment loss under this chapter unless —

(1) the extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and

(2) notice is given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required.

(d) Determination with respect to employment loss

For purposes of this section, in determining whether a plant closing or mass layoff has occurred or will occur, employment losses for 2 or more groups at a single site of employment, each of which is less than the minimum number of employees specified in section 2101(a)(2) or (3) of this title but which is the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this chapter.

§ 2103. Exemptions

This chapter shall not apply to a plant closing or mass layoff if —

(1) the closing is of a temporary facility or the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking; or

(2) the closing or layoff constitutes a strike or constitutes a lockout not intended to evade the requirements of this chapter. Nothing in this chapter shall require an employer to serve written notice pursuant to section 2102(a) of this title when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act [29 U.S.C.A. § 151 *et seq.*]: *Provided*, That nothing in this chapter shall be deemed to validate or invalidate any judicial or administrative ruling relating to the hiring of permanent replacements for economic strikers under the National Labor Relations Act.

§ 2104. Administration and enforcement of requirements

(a) Civil actions against employers

(1) Any employer who orders a plant closing or mass layoff in violation of section 2102 of this title shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for —

(A) backpay for each day of violation at a rate of compensation not less than the higher of —

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; and

(B) benefits under an employee benefit plan described in section 1002(3) of this title, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by —

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and

(C) any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation.

Appendix D

In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

(3) Any employee who violates the provisions of section 2102 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than $500 or each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

(4) If an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.

(5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

(6) In any such suit, the court, in its discretion, may allow

the prevailing party a reasonable attorney's fee as part of the costs.

(7) For purposes of this subsection, the term, "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 2102 of this title did not receive timely notice either directly or through his or her representative as required by section 2102 of this title.

(b) Exclusivity of remedies

The remedies provided for in this section shall be exclusive remedies for any violation of this chapter. Under this chapter, a Federal court shall not have authority to enjoin a plant closing or mass layoff.

§ 2105. Procedures in addition to other rights of employees

The rights and remedies provided to employee by this chapter are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this chapter shall run concurrently with any period of notification required by contract or by any other statute.

§ 2106. Procedures encouraged where not required

It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 2102 of this title should, to the extent possible, provide notice to its

employees about a proposal to close a plant or permanently reduce its workforce.

§ 2107. Authority to prescribe regulations

(a) The Secretary of Labor shall prescribe such regulations as may be necessary to carry out this chapter. Such regulations shall, at a minimum, include interpretative regulations describing the methods by which employers may provide for appropriate services of notice as required by this chapter.

(b) The mailing of notice to an employee's last known address or inclusion of notice in the employee's paycheck will be considered acceptable methods for fulfillment of the employer's obligation to give notice to each affected employee under this chapter.

§ 2108. Effect on other laws

The giving of notice pursuant to this chapter, if done in good faith compliance with this chapter shall not constitute a violation of the National Labor Relations act [29 U.S.C.A. § 151 *et seq.*] or the Railway Labor Act [45 U.S.C.A. § 151 *et seq.*].

§ 2109. Report on employment and international competitiveness

Two years after Aug. 4, 1988, the Comptroller General shall submit to the Committee on Small Business of both the House and Senate, the Committee on Labor and Human Resources, and the Committee on Education and Labor a report containing a detailed and objective analysis of the effect of this chapter on employers (especially small- and medium-sized businesses), the

economy (international competitiveness), and the employees (in terms of levels and conditions of employment). The Comptroller General shall assess both costs and benefits, including the effect on productivity, competitiveness, unemployment rates and compensation, and worker retraining and readjustment.

APPENDIX E — RELEVANT PROVISIONS OF MISSOURI WAGES, HOURS AND DISMISSAL RIGHTS STATUTE, MO. REV. STAT. §§ 290.100, 290.110

MISSOURI REVISED STATUTES

CHAPTER 290

WAGES, HOURS AND DISMISSAL RIGHTS

Generally

290.100 Thirty Days' Notice of Reduction of Wages, How

Any railway, mining, express, telegraph, manufacturing or other company or corporation doing business in this state, and desiring to reduce the wages of its employees, or any of them, shall give to the employee to be affected thereby thirty days' notice thereof. Such notice may be given by posting a written or printed handbill, specifying the class of employees whose wages are to be reduced and the amount of the reduction, in a conspicuous place in or about the shops, station, office, depot or other place where said employees may be at work, or by mailing each employee a copy of said notice or handbill, and such company or corporation violating any of the provisions of this section shall forfeit and pay each party affected thereby the sum of fifty dollars, to be recovered by civil action in the name of the injured party, with costs, before any court of competent jurisdiction.

290.110 Payment Due Discharged Employee — Exceptions — Penalty for Delay

Whenever any person, firm or corporation doing business in this sate shall discharge, with or without cause, or refuse to

further employ any servant or employee thereof, the unpaid wages of the servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of the discharge or refusal to longer employ and the servant or employee may request in writing of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station or office where a regular agent is kept; and if the money or a valid check therefore, does not reach the station or office within seven days from the date it is so requested, then as a penalty for such nonpayment the wages of the servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid; provided, such wages shall not continue more than sixty days. This section shall not apply in the case of an employee whose remuneration for work is based primarily on commissions and whose duties include collection of accounts, care of a stock or merchandise and similar activities and where an audit is necessary or customary in order to determine the net amount due.

APPENDIX F — RELEVANT MISSOURI STATUTES OF LIMITATIONS, MO. REV. STAT. §§ 516.100, 516.120, 516.300

MISSOURI REVISED STATUTES

PERSONAL ACTIONS AND GENERAL PROVISIONS

516.100 Period of Limitation Prescribed

Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued; provided, that for the purposes of sections 516.100 to 516.370, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained.

516.120 What Actions Within Five Years

Within five years:

(1) All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, an except upon judgment or decrees of a court of record, and except where a different time is herein limited;

(2) An action upon a liability created by a statute other than a penalty or forfeiture;

(3) An action for trespass on real estate;

(4) An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated;

(5) An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud. (R.S. 1939, § 1014).

ACTIONS ON PENAL STATUTES

516.380 Actions on Penal Statutes to be Brought in One Year

All actions and suits, upon any statute, for any penalty or forfeiture given in whole or in part to any person who will prosecute for the same, shall be commenced within one year after the commission of the offense, and not after. (R.S. 1939, § 3786).